

Comparative Study between Islamic and Western Law about Legal Resources

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Submission date: 18-Jun-2020 12:57PM (UTC+0700)

Submission ID: 1345797942

File name: Study_between_Islamic_and_Western_Law_about_Legal_Resources.pdf (416.34K)

Word count: 2751

Character count: 13308

Comparative Study between Islamic and Western Law about Legal Resources

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ABSTRACT

Speaking of legal sources means we are discussing the validity of the law. As Gurvitch says: "The question of the source of law is only on aspect of the general study of the validity of law". Means from a legal source can be used as a benchmark to see the validity of a law. Islamic and Western law has varying validity. Islamic law of Thecentric pattern has its own validity when returned to its source, as well as the Western law of anthropic-centric tends to negate God in its own law. This paper does not discuss where the source of the law is stronger and al³ does not judge which one is wrong and true. But this writing is only a basic comparison to see this **is the source of Islamic law** and this is **the source of** Western law.

Keywords: Islam, Western, Law, Source, Study

INTRODUCTION

The sense of law is a rule that regulates human norms and behaviors that are pushy, and for those customers will be sanctioned. The purpose of the law is to enforce justice, maintain order, and prevent chaos.

Legal instruments become very important in the enforcement of justice in a country. The legal functions also govern and control human behavior in order not to violate the rights of others. In a country, the law can be a criminal law (a country with individuals/groups), or civil law (between individuals/groups).

Surely the law is also sourced from certain legal sources. For example, law in a country is sourced from other laws and constitutional regulations. In Indonesia, the highest legal source is the constitution 1945, which is also defined in other legislation.

It is substance that this legal source problem is the deepest problem that always

arise in the philosophy of law. This may be due to a factor in relation to legal resources with the validity of the law. A law will not be able to bind the community and can be said to be unworthy of an unstrong source so, the value Philosophy the law will not be a legal certainty will not be created and justice will not be realized if the source of the law does not exist .The importance of legal resources makes it very important for this matter to be examined and researched even though it is merely a preliminary step.

RESULTS

Source of Islamic and Western law

1. Source of Islamic law

The words "source of Islamic law" is a translation of the مصادر الاحكام (Mashadir al-Ahkam). The words are not spoken in the book. The Book of Islamic law is written by the classical scholars of fiqh and Usulfiqh. Umtuk explained the meaning of the source of their Islamic law using the evidence of

Shari'ah al-'aa'a (Al-Adillah-Shara'iyah) (Jamil, 1997). The use of the word Mashadir al-Ahkam by scholars at present. Of course, what is meant by the term al-Adillah al-Syari'iyah.

Etymologically, the word المصداق (al-Mashadir) and the word الأدلة (al-Adillah) when associated with the word الشريعة (as-Syari'iyah) have different meanings (al-Mashadir) is the plural of المصداق (al-Mashdar) which means origin, source (MUNAWWIR, 1997) from whom excavated certain legal norms. While the word الأدلة (al-Adillah) is the plural form of دليل (Dail) means instruction (Jamil, 1997) to bring us to find a certain law.

Terminology the legal source is the evidence of Shari'ah, which is privileged to the law of Shari'ah (Az-Zuhaili, 1986). From this definition we can see that there is a need for excavation to issue a law from the sharia (istinbath) evidence.

According to the research of classical scholars obtained the certainty that the evidence of Syar'iyah which becomes the source of the taking of the laws pertaining to human deeds back to the four sources namely, the Qur'an, Sunnah, Ijma', and Qiyas. Keempat-empatnya has been agreed by the the majority of of Muslims used as evidence (Zahroh, without years). Furthermore, in using the evidence they also agree that the evidence has a sequence according to its order. So if there is a first event that must be seen in the Qur'an. If the law is found in the Qur'an it is done. But if the law is not found in it then it is seen in Sunnah. If not found the law then seen in Ijma' and if not found then one must stated to produce the law, by means of it with the law that has been the Nashnya (Al-Hamid, without years).

If we look in the actual rules, we agree that the most fundamental source of law in the early stages of Islam is the Qur'an and Sunnah. But along with the social dynamics of society, there are new problems that are not addressed by the Nash clearly. Thus Islamic law continues to evolve in accordance with various environmental

conditions. Finally, the process of re-thinking and an independent legal reinterpretation known as Ijtihad cannot be left.

This is a natural condition due to social dynamics. I actually want to convey that with the development of time and thought development. The classical Theory that considers Ijma' and Qiyas as the source of the agreed law begins to shift, in the sense that the source word only applies to the Qur'an and Sunnah. Because only from the lie dug legal norms while Ijma', Qiyas, Istihsan, Istidrah, Istishab, MaslahahMursalah is not included in the category of legal sources but all of which include the evidence of the Law (Jamil, 1997).

So the evidence in addition to the Qur'an and Sunnah can be interpreted as one of the ijtihaad ways to special the law. They are a systematic ijtihaad process to reveal legal provisions. It is entirely dependent on the authority of both the Qur'an and Sunnah. Thus the evidence is intertwined and essentially refers to the Qur'an. This statement is in line with the opinion of Ahmad Hasan stating that Qiyas was not as a source of law but one of the ijtihaad ways to rule the law (Hasan, 1994).

However, apart from that shift, the obvious Qur'an, Hadith, Ijma' and Ijtihad is the source and evidence of Islamic law. Abdur Rahman I. Doi mentioned: "The primary sources of the Shari'ah Islamic Legal System, are the Qur'an and the Sunnah. The secondary sources are al-Ijma', Al-Qiyas, and al-Ijtihad which are detived from the legal anjunction of the Holy Qur'an and Sunnah of the Prophet "(Doi, 1992).

It is clear that the Qur'an and hadith as the main source while otherwise it is a source of support that should not be detached from the main source. Whatever the story, everything will still be returned to the main source. That is what characterizes or patterns in Islamic law that adheres to theocentric understand.

This article does not explain details of all sources or the evidence of Islamic law. The obvious in Islamic law is

the main source it is the Qur'an and hadith. Others are only evidence (stated for the law) that is not independent but always related to the main source. In the subsequent developments the scholars divide the source to the agreed and the evidence is still disputed. Each of the Fiqh scholars differ in the use of the evidence that is disputed.

Source of Western Law

As already described, the Western law is anthropocentric. The author is a historical accident in which the church used to make the law as a means of legalization of church authorities. This is probably one of the factors that made the law in the West allergic to God. I make this statement only as an illustration, researching the source of this Western law is not as easy as tracking the source of Islamic law.

We know that there are many meanings and terms of the sources of law and often become a cause of confusion if we are careful with the specific meaning given to the term.

The word "legal source" in legal science is often used in some sense. Therefore, when the term of the legal source is found, it must be known, in what sense the term is used. The following is stated in some sense of the term of the law:

1. The source of the law in such a "legal origin" is the decision of the ruling authority to make the decision. This means that the decision must come from a competent ruler (having authority) for it.
2. The source of the law in its understanding as a "place" which is found in the prevailing legal regulations of the legal source in this sense leads to an investigation of various kinds, types and forms and regulations and provisions.
3. The source of the law in its understanding as "the things that can or should affect the ruler in determining the law". For example, the belief in the law of Justice feels the ruler or other such formulation. Either of the ruler or his people/society, and also the theory, opinions or lessons of the Science of Law (Syahrani, 1999).

In general, the source of the law is everything that raises the rules that have force that are pushed, namely the rules that are considered to result in strict and real sanctions (Kansil, 1989).

In addition to the above understanding the term "formal legal source and material law source". In legal science books that study theory-Theory law, often referred to as the place where the positive laws are found, refers to the forms of regulation and Decree. Those resources are:

1. Legislation (Statue)
2. Habit (Custom)
3. Decision of judge (Jurisprudence)
4. Agreement
5. Bachelor's opinion

While the source of material law is what is meant as a source of law with the understanding of things that can affect the ruler and determine the law. In other words the legal source in the sense of material that determines the pattern of the legal content or something reflected in the content of the law of the material determines where the law, determines the size, what content to be fulfilled in order to be called the law and has Binding power is the norm that must be obeyed as law (Usman, 2001). The legal content determined by the ideal factors is the direct purpose of the law itself that can be influenced by the state and concrete needs of the community. The social factors that make up the law come from the actual state of the community.

Formal legal sources are defined by Satmond with a rule of law derived from force forces and validity. While the source of material law concerning legal material (content) is not validity. The formal source of law is the will of the state manifested into the law or the judicial decree. An example of material sources is custom. The rules that assess the incarnated habit become the law that is sourced from the life of society, but what makes it a legal force is not the norm but it depends on the legal definition that is specifically taken by Satmond. If the law is considered something made by the will of the state then the source of his formalized

law is state. If the law is a commandment (commandment) ruler then that ruler is the source of his formalized law.

But when we take a different definition, we will also conclude that the source of the formalized law is the other. If the legal validity is because the law is a natural law or absolute practice, then the legal source is the ideal level that has been laid, if the validity of the law is a sense of The right is the legal source. If the validity of the law is from the habit, then the habit of society is the source of the law.

So the view of both formal and material legal sources depends on their own perspective. But at least the formal division and material is acceptable even if there is also a protest. Like Dr. Allen: "So many different theory has been made around the source terminology, it is better to use another terminology by asking: "What is the secret of the validity of law. Whence comes the material from which law is fashioned? ".

In other countries, the law is normally made by formal or judicial or other (legislative and indicative) decisions of both individuals and groups of people who work in command of the ruler. The material source is very comprehensive all depicted in the framework of the work process.

The author thinks that the source of the Western law depends on the validity of what we make to reject the measure. Using different benchmarks produces different results as well. But nevertheless we can compromise the western source of the law.

CONCLUSION

The style of the theocentric law of Islam makes it all to be based on revelation. In the sense of the dimension of dignity in Islamic law is always related. Although the blasphemy of the law is done by ijtihad (use sense) but still the source of its use is a major source in Islamic law itself is the Qur'an and Sunnah. Unlike the Western law of an anthropic which is universal as the primary source in absolute nature, as human beings have a sense of justice, the feeling is

referred to as the basic norm (grand norm) from here made theory Law/sect, the result of Theoritis formulation that is the positive law.

In Islamic law the validity of the law is clearly seen from the Total measure the closeness of the regulation with the purpose of God which is contained in Revelation. In which sense is closer to the main source. Unlike the law in the West, the source of the law is dependent on the terminology we see it. Different viewpoints will make different legal sources as well. But the obvious common distinction of these two legal systems is the Islamic law with a dimension of femininity (God) while the Western law is of absolute dimension to humanity where humanity is the main source.

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How to cite this article: Wanto S, Rahmadi PF. Comparative study between Islamic and Western law about legal resources. International Journal of Research and Review. 2019; 6(10):332-336.

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